Docket: 2023-2375(IT)G

BETWEEN:

1478873 ONTARIO INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

Motion determined pursuant to section 69
of the *Tax Court of Canada Rules (General Procedure)*

By: Associate Judge Andrew Miller

Written submissions by:

Counsel for the Appellant:	Bharat Galani
Counsel for the Respondent:	Casey Bee

ORDER

WHEREAS the Respondent filed a motion pursuant to section 69 of the *Tax Court of Canada Rules (General Procedure)* for an order striking the following paragraphs, columns and words from the Appellant's Fresh Amended Notice of Appeal:

1) Paragraphs 17 to 19, 29 to 33, 37, 56, 59 to 80, 92, 95, 101 to 111 and 112(ii), and the words "and CERS" from paragraph 34;

2) The columns labeled "CERS Period #" and "CERS Claim Made" as well as the words in the title "and CERS" from Schedule A; and

3) Schedule D.

AND WHEREAS the Appellant filed its motion record in response to the Respondent's motion.

AND WHEREAS both the Respondent and Appellant are seeking costs.

NOW THEREFORE THIS COURT ORDERS THAT:

1) The Respondent's motion is granted in part in accordance with the below Reasons for Order. Specifically, the following shall be struck from the Fresh Amended Notice of Appeal:

    i. The words "(attached as Schedule D)" from paragraph 33;

    ii. Paragraphs 56, 101 to 111 and 112(ii); and

    iii. Schedule D.

2) The Appellant shall, within 30 days of the date of this Order, file and serve an Amended Fresh as Amended Notice of Appeal.

3) The Respondent shall, within 60 days of service of the Amended Fresh as Amended Notice of Appeal, file and serve an Amended Reply to the Amended Fresh as Amended Notice of Appeal.

4) Costs shall be in the cause.

Signed this 26th day of January 2026.

"Andrew Miller"

Miller A.J.

Citation: 2026 TCC 5
Date: 20260126
Docket: 2023-2375(IT)G

BETWEEN:

1478873 ONTARIO INC.,

Appellant,

and

HIS MAJESTY THE KING,

Respondent.

REASONS FOR ORDER

Miller A.J.

[1] The Respondent has brought a motion under section 69 of the *Tax Court of Canada Rules (General Procedure)* (the "Rules") for an order striking portions of the Appellant's Fresh Amended Notice of Appeal, with costs, on the basis that they disclose no reasonable grounds for appeal pursuant to paragraph 53(1)(d) of the Rules.

Facts

[2] The Appellant operates a retail jewelry business. This business was severely impacted by the outbreak of the COVID-19 pandemic. The Appellant applied for the Canada Emergency Wage Subsidy (the "CEWS") for qualifying periods beginning on March 15, 2020, and ending on August 28, 2021.[1] The Appellant also applied for the Canada Emergency Rent Subsidy (the "CERS") for qualifying periods overlapping its CEWS qualifying periods. The Appellant's CEWS claim and CERS claim were audited by the Canada Revenue Agency (the "CRA").

[3] By Notice of Determination and Notice of Redetermination (together the "Determinations"), the Minister of National Revenue reduced the Appellant's

[1] The CEWS qualifying periods identified by the parties do not appear to match. See Schedule A of the Reply to the Notice of Appeal and paragraph 15 of the Fresh Amended Notice of Appeal. For the purposes of this Motion, this is of no consequence.

CEWS eligibility and claims to nil. The Minister also issued a Notice of Reassessment assessing gross negligence penalties under subsection 163(2) of the *Income Tax Act* (the "ITA") in respect of the Appellant's 2020 and 2021 taxation years. The Appellant appealed the Determinations and Reassessment raising the following issues:[2]

> 54. Did the Minister err in confirming the determinations and redeterminations that the Appellant did not meet the required revenue drop thresholds for CEWS eligibility for the 19 CEWS Claim Periods and that the salaries paid by the Appellant during the said periods do not qualify [as] eligible remuneration under the CEWS Programs?
>
> 55. Did the Minister err in imposing GNP (subsequently reassessing and confirming them) totaling $81,636 under section 163(2) of the ITA?
>
> 56. Did the Minister breach the duty of procedural fairness by inconsistently applying rules in the CEWS and CERS audits, leading to contradictory decisions based on identical financial records?

Parties' positions

[4] The Respondent says that the following portions of the Fresh Amended Notice of Appeal should be struck:[3]

1) For referring to procedural fairness: the facts at paragraphs 17 to 19, 29 to 33, 37, the words "and CERS" from paragraph 34, and the columns labeled "CERS Period #" and "CERS Claim Made" as well as the words in the title "and CERS" from Schedule A.

2) For referring to procedural fairness: the grounds at paragraphs 56, 59 to 80, 92, 95 and 101 to 111.

3) For being relief beyond the Court's jurisdiction: paragraph 112(ii).

4) For being evidence not facts: Schedule D.

[5] The Appellant concedes that the Respondent's motion should be granted but only for the purposes of striking paragraphs 56 and 101 to 111, as well as to allow

[2] See Fresh Amended Notice of Appeal, paras. 54 to 56.
[3] Notice of Motion, para. 1.

the Appellant to amend paragraph 112(ii), and by excising Schedule D.[4] The Appellant maintains that the remaining disputed portions of the Fresh Amended Notice of Appeal are material facts and arguments that properly challenge the Determinations and Reassessment.[5]

[6] The Appellant argues that both the CEWS and CERS are governed by subsection 125.7(1) of the ITA and notes that while the CERS determination is not the subject of an appeal, the same books and records of the Appellant were relied on by the CRA for the purposes of determining the eligibility of the Appellant for the CEWS and the CERS. The Appellant says that the audits of the CEWS and the CERS yielded inconsistent results. The Appellant argues that the remaining CERS references "are pleaded solely to demonstrate the factual incorrectness of the CEWS assessment and penalties under the ITA – not to challenge procedural fairness".[6]

Analysis

i) The law

[7] The Respondent raises paragraph 53(1)(d) of the Rules as the basis to strike portions of the Fresh Amended Notice of Appeal. Subsection 53(1) provides the following:

> **53 (1)** The Court may, on its own initiative or on application by a party, strike out or expunge all or part of a pleading or other document with or without leave to amend, on the ground that the pleading or other document
>
> **(a)** may prejudice or delay the fair hearing of the appeal;
>
> **(b)** is scandalous, frivolous or vexatious;
>
> **(c)** is an abuse of the process of the Court; or
>
> **(d) discloses no reasonable grounds for appeal or opposing the appeal**.
>
> (Emphasis added.)

[4] Appellant's written representations, paras. 3 and 4.
[5] Appellant's written representations, para. 4.
[6] Appellant's written representations, para. 8. See paragraphs 7 to 10, 12, 16 and 30 to 36 of the Appellant's written representations.

[8] The decision to strike out pleadings is a discretionary one, and the onus to show that a pleading should be struck is on the party seeking such relief.[7] In order to strike a pleading or a portion of a pleading under paragraph 53(1)(d) of the Rules, it must be "plain and obvious", assuming the facts pleaded to be true, that the pleading or portion of the pleading discloses no reasonable grounds for appeal.[8] Where the test at section 53 of the Rules has been met, the Court must still consider whether there are other methods to address the identified deficiencies of the pleading.[9]

[9] The Respondent's motion to strike is mainly guided by the argument that any ground and related fact that raise a breach of procedural fairness as a basis to allow the appeal should be struck. As the Fresh Amended Notice of Appeal reveals, the Appellant raises as an issue a breach of procedural fairness by the Minister in "inconsistently applying rules in the CEWS and CERS audits, leading to contradictory decisions based on identical financial records".[10] The Appellant's argument is expanded upon in eleven paragraphs under the heading "Breach of Procedural Fairness in CRA's Inconsistent Audits".[11]

[10] I agree with the Respondent that it is plain and obvious that the issue of procedural fairness, and the related grounds, is not a reasonable ground for appeal as it is a matter that is beyond this Court's jurisdiction.[12] It appears that the Appellant also agrees as it concedes that that issue and the related grounds be struck from its Fresh Amended Notice of Appeal, specifically paragraphs 56 and 101 to 111.

[11] Accordingly, the remaining portions of the Fresh Amended Notice of Appeal that are in dispute for the purposes of this motion are:

1) The facts at paragraphs 17 to 19, 29 to 33, 37, the words "and CERS" from paragraph 34, and the columns labeled "CERS Period #" and "CERS Claim Made" as well as the words in the title "and CERS" from Schedule A. (the "impugned facts")

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[7] *His Majesty the King v. John Preston, Monika Preston and The Preston Family Trust II*, 2023 FCA 178, at paras. 12 and 16.
[8] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at para. 17. Main Rehabilitation Co. Ltd. v. Canada, 2004 FCA 403, at para. 3.
[9] *His Majesty the King v. John Preston, Monika Preston and The Preston Family Trust II*, 2023 FCA 178, at para. 37.
[10] Fresh Amended Notice of Appeal, para. 56.
[11] Fresh Amended Notice of Appeal, paras. 101 to 111.
[12] *Ereiser v. R.*, 2013 FCA 20, at para. 31; *Main Rehabilitation Co. Ltd. v. Canada*, 2004 FCA 403, at para. 8.

2) The grounds at paragraphs 59 to 80, 92 and 95. (the "impugned grounds")

3) The relief sought at paragraph 112(ii).

ii) The impugned facts in the Fresh Amended Notice of Appeal

[12] The Respondent seeks to expunge any reference to CERS and the CERS audit from the Fresh Amended Notice of Appeal. For the purposes of the impugned facts, the Respondent contends that they relate solely to the procedural fairness issue, which has no chance of success, and therefore must follow the fate of that issue and be struck. I do not agree.

[13] The Respondent's motion is based solely on paragraph 53(1)(d) of the Rules. I am not convinced that this is a basis for striking facts. Instead, the Respondent should have relied on paragraph 53(1)(a) of the Rules to strike the impugned facts.[13] Because subsection 53(1) of the Rules states that the Court "may, on its own initiative" strike a pleading, I find that the failure to identify the proper basis to strike the impugned facts is not in and of itself fatal to the relief sought by the Respondent.

[14] The impugned facts can be summarized as a description of the Appellant's CERS claim and the CERS audit including its outcome. According to the Appellant, the qualifying periods of the CEWS claims and CERS claims overlapped. Moreover, the same books and records relied on by the Appellant for the CEWS audit were relied on by the Appellant for the CERS audit.[14]

[15] The Appellant argues that the CERS references are no longer being relied on to challenge procedural fairness and that "CERS references are pleaded solely to demonstrate the factual incorrectness of the CEWS assessment and penalties under the ITA – not to challenge procedural fairness".[15] The Appellant adds that the impugned facts are "indispensable to demonstrating that the CEWS assessment, including the imposition of gross negligence penalties, is factually and legally incorrect, as they highlight a direct contradiction in the CRAs [sic] treatment of identical financial records."[16]

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[13] *Hillcore Financial Corporation v. His Majesty the King*, 2023 TCC 71, at paras. 27 and 28.
[14] Fresh Amended Notice of Appeal, paras. 17, 29, 32, 33 and 37.
[15] Appellant's written representations, para. 8.
[16] Appellant's written representations, paras. 7 and 16.

[16] While I am not convinced that inconsistencies between the CERS and CEWS audit results will have any bearing on the appeal before this Court,[17] it is not for me as motions judge to rule on this matter. This will be left to the trial judge.

[17] Again, for this motion it is not my role as motions judge to rule on the question of relevance. However, I do see how the facts of the CERS audit could be used by the Appellant in mounting a defence in respect of the Respondent's evidence relating to the gross negligence penalties assessed under subsection 163(2) of the ITA. It is noteworthy that in the Reply to the Notice of Appeal, the Respondent states as a fact in support of the gross negligence penalties that the Appellant did not maintain adequate books and records to support its CEWS claims and that these books and records were "insufficient and unreconcilable".[18] If these same books and records were sufficient to determine the validity of the CERS claims, the apparent inconsistent treatment of them might be material to determining whether "the Appellant knowingly, or under circumstances amounting to gross negligence, made or participated in, assented to or acquiesced in the making of, false statements or omissions in its applications for the CEWS".[19]

[18] At paragraph 33 of the Fresh Amended Notice of Appeal, the Appellant refers to Schedule D, a document that it has agreed should be excised from its pleading. As such, the words "(attached as Schedule D)" should be struck from paragraph 33. Even though what is left is a reference to the removed document and a direct quote from it, the Rules allow for this to be done by providing for certain consequences for doing so.[20] Accordingly, there is no distinct basis to strike what remains at paragraph 33.

[19] As this Court stated in *Cote Estate*, unless it is plain and obvious that a fact could never be relevant for the purposes of an appeal, that question should be left to the trial judge who will hear the entirety of the evidence.[21] I am not convinced that the impugned facts could never be relevant for this appeal. Other than the reference to Schedule D at paragraph 33, the impugned facts should not be struck from the Fresh Amended Notice of Appeal.

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[17] Appellant's written representations, para. 31.
[18] Reply to the Notice of Appeal, paras 13c) and 13g).
[19] Reply to the Notice of Appeal, para. 26.
[20] See *Tax Court of Canada Rules (General Procedure)*, at sections 51, 80 and 89.
[21] *Cote Estate v. His Majesty the King*, 2023 TCC 66, at para. 5.

iii) The impugned grounds in the Fresh Amended Notice of Appeal

[20] As with the impugned facts, the Respondent seeks to strike the impugned grounds on the basis that they relate solely to the issue of procedural fairness initially raised in the Fresh Amended Notice of Appeal.[22] I do not agree with the Respondent's interpretation of the impugned grounds.

[21] Paragraphs 59 to 62 of the Fresh Amended Notice of Appeal fall under the heading "Validation of Financial Records Across CRA Audits". Paragraphs 63 to 73 fall under the heading "CEWS Eligibility Through Corrected Revenue Calculations". Paragraphs 74 to 80 fall under the heading "Alternative Treatment Options for GroupCo Sales". Paragraph 92 is just one among many paragraphs under the heading "Legitimacy of Non-Arm's Length Salaries" and paragraph 95 is one of several paragraphs under the heading "Unjust Imposition of GNP".

[22] It is difficult to determine how these grounds precisely relate to the remaining issues raised in the appeal. As previously noted, the Appellant conceded that the issue of procedural fairness and the related grounds be struck from its Fresh Amended Notice of Appeal, specifically paragraphs 56 and 101 to 111. This leaves the Appellant's eligibility for CEWS and the gross negligence penalties as the remaining issues. Paragraphs 59 to 62, 92 and 95 seem to advance an argument relating to the inconsistent results of the CERS and CEWS audits. Absent an occasional reference to CERS, paragraphs 63 to 73 and 74 to 80 appear to advance arguments relating to the CEWS determinations.

[23] As noted above, I question whether the alleged inconsistencies between the CERS and CEWS audit results will have any bearing on the appeal before this Court of the CEWS determinations. At the same time, I see a possible path of relevance and materiality in relation to the gross negligence defence the Appellant must mount. Again, none of this is for me to decide.

[24] However, the difficulty I have in understanding the precise nature of the arguments laid out in the impugned grounds is the very reason why the Courts have expressed that it should only be in a plain and obvious case that I should strike a paragraph. As stated by the Federal Court of Appeal:

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[22] Respondent's written submissions, para. 14.

> In general, "a motions judge should be very cautious about categorizing an allegation and deciding to strike part of a pleading as a result. Unless it is clear-cut, it is generally appropriate to leave questions as to the category of an allegation and… the consequences that may arise to the trial judge" (*Kopstein* at para. 23). Deficiencies can be addressed in discovery or through a demand for particulars (*Kopstein* at paras. 63-65; *Bemco Confectionery and Sales Ltd. v. The Queen*, 2015 TCC 48 at para. 49, aff'd *Bemco Confectionery and Sales Ltd. v. The Queen*, 2016 FCA 21).[23]

[25] I find that it is not plain and obvious that the impugned grounds relate solely to matters beyond the jurisdiction of this Court. Any ambiguity or uncertainty surrounding these grounds can be addressed at discovery or by any other appropriate means. Ultimately, it will be for the trial judge to resolve these matters. What is certain is that the Appellant cannot rely on the arguments raised in these paragraphs to advance an argument that is not within this Court's jurisdiction, in this case the issue of procedural fairness. For these reasons, the impugned grounds will not be struck.

iv) <u>The relief sought at paragraph 112(ii) in the Fresh Amended Notice of Appeal</u>

[26] As part of the items listed as relief sought under part (G) of the Fresh Amended Notice of Appeal, the Appellant requests that this Court "CANCEL the Confirmation in issue pertaining to the Determination, Redetermination and Reassessment". The Respondent is correct, this sought-after relief should be struck from the pleading without leave to amend as this is relief that cannot be granted by this Court.

[27] Generally, appeals to this Court are of assessments, reassessments or determinations.[24] The Tax Court of Canada has exclusive jurisdiction to hear such appeals.[25] However, it may only dispose of an appeal by dismissing it or allowing it. If the appeal is allowed, the Court can only vacate the assessment, vary the assessment or refer the assessment back to the Minister for reconsideration and

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[23] *His Majesty the King v. John Preston, Monika Preston and The Preston Family Trust II*, 2023 FCA 178, at para. 39.
[24] Section 169 of the *Income Tax Act*.
[25] Section 12 of the *Tax Court of Canada Act*.

reassessment.[26] Accordingly, this Court cannot cancel the Notice of Confirmation. It is therefore plain and obvious that this request for relief cannot succeed and as such is struck from the Fresh Amended Notice of Appeal, without leave to amend.

Costs

[28] Both parties have asked for costs. Given the mixed results, I am awarding costs in the cause.

[29] The Respondent was successful in having the issue of procedural fairness and paragraph 112(ii) struck from the Fresh Amended Notice of Appeal. The Respondent was not successful with the balance of the motion. While the Appellant states that concessions were made on June 15, 2025, prior to the Respondent's motion, I have no evidence of when these concessions were made and what led to them.[27]

Signed this 26th day of January 2026.

"Andrew Miller"

Miller A.J.

[26] Section 171 ITA. The same is true in respect of CEWS determinations or redeterminations, by virtue of subsections 152(1.2) and 152(3.4) ITA.
[27] Appellant's written representations, paras. 40 and 44.

CITATION:	2026 TCC 5
COURT FILE NO.:	2023-2375(IT)G
STYLE OF CAUSE:	1478873 Ontario Inc. AND HIS MAJESTY THE KING
REASONS FOR ORDER BY:	Associate Judge Andrew Miller
DATE OF ORDER:	January 26, 2026

WRITTEN SUBMISSIONS BY:

Counsel for the Appellant:	Bharat Galani
Counsel for the Respondent:	Casey Bee

COUNSEL OF RECORD:

For the Appellant:

Name:	Bharat Galani
Firm:	Capital Tax Law

For the Respondent:	Shalene Curtis-Micallef Deputy Attorney General of Canada Ottawa, Canada